UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| In re ENRON CORPORATION SECURITIES LITIGATION | § | Civil Action No. H-01-3624 |
| | § | **(Consolidated)** |
| | § | |
| | § | CLASS ACTION |
| This Document Relates To: | § | |
| MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, | § | |
| Plaintiffs, | § | |
| vs. | § | |
| ENRON CORP., et al., | § | |
| Defendants. | § | |
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, | § | |
| Plaintiffs, | § | |
| vs. | § | |
| KENNETH L. LAY, et al., | § | |
| Defendants. | § | |

**LEAD PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DISMISSING CLAIMS AGAINST THE DEUTSCHE BANK DEFENDANTS (DOCKET NO. 2036)**

2101

Lead Plaintiff hereby respectfully submits its Motion for Reconsideration of Order Dismissing Claims Against the Deutsche Bank Defendants. Plaintiffs have conferred with Deutsche Bank and have been unable to reach an agreement as to the disposition of this Motion.

On March 29, 2004, the Court dismissed plaintiffs' claims against Deutsche Bank AG, Deutsche Bank Securities, Inc., DB Alex. Brown LLC, and Deutsche Bank Trust Company Americas (collectively "Deutsche Bank") under §§10(b) and 20(a) of the Securities Exchange Act of 1934. *See* March 29, 2004 Order at 91 (Docket No. 2036). The Court deemed these claims "time-barred by the three-year statute of repose" because Deutsche Bank's structured tax deals ("STDs") closed in excess of three years prior to plaintiffs' filing of the Consolidated Complaint on April 8, 2002. *Id.* at 75. Plaintiffs respectfully submit that the Court understandably focused on plaintiffs' new allegations concerning the STDs alone, without considering whether other primary deceptive acts Deutsche Bank committed during the Class Period were performed with scienter demonstrated by significant pre-Class Period conduct.[1] Plaintiffs allege Deutsche Bank made numerous statements during the Class Period, which it knew were false and misleading because of its pre-Class Period and ongoing conduct in connection with its STDs. Accordingly, plaintiffs move for reconsideration pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. *See Compaq Computer Corp. v. Ergonome Inc.*, No. H-97-1026, 2001 U.S. Dist. LEXIS 23487, at *5 n.2 (S.D. Tex. June 25, 2001).

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[1] Plaintiffs assert that with respect to Deutsche Bank AG ("Parent"), the operative period of repose dates to April 8, 1999, three years before plaintiffs filed the Consolidated Complaint against Parent. With respect to the newly-added defendants, Deutsche Bank Securities Inc., DB Alex. Brown LLC, and Deutsche Bank Trust Company Americas (collectively, the "Subsidiaries") the operative period of repose dates to January 14, 2000. *See* Order at 74. Therefore, throughout this Motion, "Class Period" refers to the class periods for plaintiffs' claims against Parent and the Subsidiaries, as defined by the periods of repose found by this Court in its Order. Plaintiffs do not assert a class period outside the period of repose. Accordingly, references to Class Period conduct throughout this Motion concern conduct during the period of repose.

In determining that plaintiffs' §10(b) claims as to Deutsche Bank were time-barred, the Court found that plaintiffs had in all other respects "adequately and particularly stated a claim against the Deutsche Bank Entities as secondary actors committing primary violations of §10(b) and Rule 10b-5, including facts giving rise to a strong inference of scienter on their part." Order at 40. Nevertheless, because the Court found Deutsche Bank could not be liable for its involvement in the STDs, the Court held "the pleadings, without those claims, are insufficient to raise the requisite strong inference of scienter and to state a claim." Order at 41. The Court's limitation, however, appears inconsistent with the law of this case.

As this Court previously held, even where liability is foreclosed by the passage of time, allegations pre-dating the Class Period may be considered in proving a defendant's Class Period knowledge or in alleging a pattern and practice amounting to a scheme:

> Various Defendants have contended that specific claims under § 10(b) and Rule 10b-5 are time-barred as a matter of law. A private right of action under §10(b) "must be commenced within one year after discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991).
>
> Lead Plaintiff has responded that it is not seeking to recover damages for alleged misconduct that occurred more than three years before suit was filed, but is pleading such purported violations solely to establish evidence of a scheme and of scienter. Such evidence is admissible for this purpose. *Ashdown*, 509 F.2d 793 (5th Cir. 1975) (mail fraud); *United States v. Blosser*, 440 F.2d 697, 699 (10th Cir. 1971) (same); *Fitzgerald v. Henderson*, 251 F.3d 345 (2d Cir. 2001) (Title VII). The Court agrees and considers those allegations to be admissible solely for the purpose of establishing a ***scheme and/or scienter***.

*In re Enron Corp. Sec. Litig.*, 235 F. Supp. 2d 549, 689 (S.D. Tex. 2002) (emphasis added).

This is a well-reasoned distinction that balances the desire to afford defendants repose without providing a free pass to bad actors who knowingly commit additional distinct, deceptive acts during the period of repose for which plaintiffs may bring claims. In addition, there is no logical or normative reason to assume that a defendant's knowledge acquired immediately prior to the period

of repose was somehow forgotten within the period of repose. Rather, the *ex post facto* application of an arbitrary repose period should have no bearing on a defendant's actual knowledge gained prior to that period. Consistent with the Court's prior decisions, this should include evidence of scienter that predates the period of repose. Indeed, the Court "must consider any evidence of scienter pleaded by the plaintiffs cumulatively." *Goldstein v. MCI Worldcom*, 340 F.3d 238, 247 (5th Cir. 2003). Here, Deutsche Bank's pre-Class Period and ongoing conduct in connection with the STDs demonstrates its false and misleading statements concerning Enron were made with scienter.

Moreover, as the Court has already recognized in this case, once a defendant joined in the fraudulent Enron Ponzi scheme, later actions by the same defendant are suspect:

> Where Lead Plaintiff has once adequately alleged that a party took such an affirmative step with scienter, not only that immediate act or material misrepresentation or omission, which without adequate public disclosure directly or indirectly manipulated the financial picture of Enron or the value of its securities, any alleged subsequent activity by that party, such as continuing to lend funds to Enron-controlled SPEs or soliciting or selling Enron securities or even silence, necessarily becomes suspect as further complicity in, expansion of, and perpetuation of the alleged Ponzi scheme.

*Enron*, 235 F. Supp. 2d at 695. Lead Plaintiff raised this theory of its case against Deutsche Bank in its opposition to Deutsche Bank's motion to dismiss. Perhaps because the focus of Deutsche Bank's Motion concerned whether the STDs closed within the period of repose, the Court apparently did not address Lead Plaintiff's argument or distinguish the allegations against Deutsche Bank from the other allegations upheld by the Court in this case under the same theory.

In this instance, the facts establish that Deutsche Bank's involvement in the Enron fraudulent scheme did not stop with its knowing participation in the fraudulent STDs. For example, Deutsche Bank made false and misleading statements in offering documents in its role as an underwriter of Enron securities during the Class Period. Critically, Deutsche Bank participated in underwriting billions of dollars of off-balance sheet debt between 1999-2001 to finance the Enron Ponzi scheme and falsify Enron's reported cash flows. Each of these underwritings was made pursuant to offering

documents incorporating by reference Enron's financial results that Deutsche Bank falsified with its STDs. *See* Plaintiffs' Memorandum of Law in Opposition to the Deutsche Bank Defendants' Motion to Dismiss ("Pltfs' Mem.") (Docket No. 1707) at 24 (relevant pages attached as Ex. A). Deutsche Bank's pre-Class Period role in creating, structuring and funding the STDs made it keenly aware that Enron's Class Period financial results were false – yet Deutshe Bank sold Enron securities anyway. *Id.* That prior to the period of repose Deutsche Bank garnered its knowledge Enron's financial statements were falsified should not defeat plaintiffs' claims against Deutsche Bank arising out of Deutsche Bank's underwriting ***during*** the Class Period.

Similarly, throughout the Class Period, Deutsche Bank issued analyst reports containing Enron's false and misleading financial results, concealing material adverse information about Enron, and rating Enron's stock inconsistent with its internal information. While stating unmitigated praise for Enron and its business prospects, each of Deutsche Bank's analyst reports concealed that Enron's purported financial results were created by bogus tax schemes and not business operations. *See* ¶¶127, 131, 146, 152, 159, 184, 210, 232, 237, 243, 253, and 257. *See also* Pltfs' Mem at 22-23. Plaintiffs' claims arising out of this Class Period conduct, like the other well-pleaded claims against Deutsche Bank, are supported by plaintiffs' pre-Class Period scienter allegations. That certain alleged scienter (demonstrated by Deutsche Bank's STDs) is evidenced by conduct the Court found occurred prior to the period of repose, should not defeat plaintiffs' claims arising out of false and misleading analyst reports Deutsche Bank issued ***during*** the Class Period.

Deutsche Bank significantly furthered the fraudulent Enron Ponzi scheme during the Class Period. And Deutsche Bank did more than make representations concerning Enron's financial statements with full knowledge those statements were false and misleading because of the STDs it

created, structured and funded.[2] Here, as the Court recognized in the March 29, 2004 Order, Enron's Bankruptcy Examiner found "that by 2000, ***while continuing to recommend Enron securities***, Deutsche Bank had learned a substantial amount about Enron's undisclosed and precarious off-balance sheet debt." Order at 40 n.33 (emphasis added). Viewed cumulatively with the additional facts pleaded by plaintiffs (*see, e.g.,* Pltf's Mem. at 24-25) – and taking into consideration that Deutsche Bank designed, funded, and executed the STDs to falsify Enron's financial results for years into the future – plaintiffs have pleaded a strong inference of scienter as to Deutsche Bank's deceptive Class Period acts.

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[2] Moreover, as one of Enron's Tier One banks, Deutsche Bank had considerable contacts with the Company throughout the Class Period and acted to further the fraudulent Enron scheme during the Class Period by, among other things: investing in LJM2 (¶797); serving on the LJM2 advisory committee (*see* 3rd Report, App. G at 13) (Ex. B); participating in the Whitewing transactions which helped falsify Enron's financial results throughout the Class Period (*see* 3rd Report, App. G at 4; *see also* ¶¶28, 469, 497-505); and acting as a partner in various SPEs connected with the STDs (*see* Pltf's Mem. at 9-12) . Deutsche Bank's furtherance of the fraud during the Class Period violates Rule 10b-5 in itself but also provides ample support for the strong inference that Deutsche Bank knowingly made false and misleading statements concerning Enron's Class Period financial results during the Class Period.

For the reasons stated herein, and as set forth in Pltf's Mem., plaintiffs respectfully request the Court reinstate plaintiffs' §10(b) and §20(a) claims against Deutsche Bank for its actions committed during the Class Period.

DATED: April 20, 2004

Respectfully submitted,

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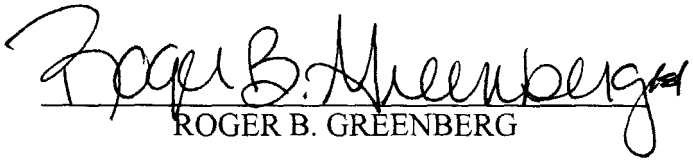

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DISMISSING CLAIMS AGAINST THE DEUTSCHE BANK DEFENDANTS (DOCKET NO. 2036) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this April 20, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DISMISSING CLAIMS AGAINST THE DEUTSCHE BANK DEFENDANTS (DOCKET NO. 2036) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this April 20, 2004.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
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Mo Maloney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| In re ENRON CORPORATION SECURITIES LITIGATION | § Civil Action No. H-01-3624 **(Consolidated)** |
| This Document Relates To: | § CLASS ACTION |
| MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,<br>Plaintiffs,<br>vs.<br>ENRON CORP., et al.,<br>Defendants. | § |
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,<br>Plaintiffs,<br>vs.<br>KENNETH L. LAY, et al.,<br>Defendants. | § |

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DEUTSCHE BANK DEFENDANTS' MOTION TO DISMISS**

### 1. Project Cochise

Project Cochise involved the transfer of mortgage-backed securities and other assets from Deutsche Bank to an Enron affiliate, whereby both Enron and Deutsche Bank improperly sheltered taxable income with the tax deductions from the same assets. ¶797.20. Deutsche Bank maintained a continuing role in Project Cochise well into the Class Period. Indeed, even though Project Cochise closed in January 1999, Deutsche Bank was to earn fees starting in September 1999 through December 2002 for its continuing participation in the STD. ¶797.20.

Step 1 of Project Cochise required Enron to purchase two airplanes from Deutsche Bank for $46.7 million in January 1999. *See* JCT Report at 151-52; 3rd Report, App. G at 37, 51-52. Step 2 required Deutsche Bank to buy back the same planes from Enron for $36.5 million on June 28, 2000. The planes were later to be sold, again, to Enron, one month later through an Enron subsidiary named Oneida. *See id.* Upon selling the Cochise planes back to Deutsche Bank on June 28, 2000, "Enron reported the entire sale proceeds of $36.5 million as net income on the sale." 3rd Report, App. G at 52. "Enron's recognition of gain on the sale of the Cochise planes did not comply with GAAP for several reasons." *Id.*[6] Thus, there can be no doubt that Deutsche Bank's re-purchase of the Cochise planes on June 28, 2000 – an action committed as part of the fraudulent Project Cochise STD – occurred not greater than three years before Lead Plaintiff filed the First Amended Complaint.

Moreover, Deutsche Bank not only played a primary role in the second phase of Project Cochise, but Deutsche Bank's role in structuring the first phase of the transaction required Deutsche Bank to commit primary violations of the federal securities laws throughout the Class Period. As part of Project Cochise, Deutsche Bank became a partner with Enron in a phony Deutsche Bank entity called Maliseet. JCT Report at 150-51. Deutsche Bank and Enron were the principal investors in Maliseet. *Id.* And they entered a shareholders' agreement with respect to Maliseet that called for Deutsche Bank to commit acts in furtherance of Project Cochise as late as January 28, 2004. *Id.* at

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[6] Deutsche Bank asserts that the Examiner did not find Deutsche Bank acted with scienter in violating GAAP on the sale of the Cochise planes. Motion at 17-19. The Examiner's report belies any such contention: "After Enron concluded that it could not recognize gain on a direct sale to Oneida, ***Enron and BT/Deutsche Bank devised a plan*** to transfer the Cochise Planes first to a BT/Deutsche entity, and then to Oneida. Enron's recognition of gain on the two-step transfer, however, ***was plainly a violation of GAAP***...." 3rd Report, App. G at 54.

151, 154. Maliseet played an essential role in Project Cochise, which artificially inflated Enron's earnings by $27.7 million in 1999, $50.3 million in 2000 and $23.2 million in 2001. *Id.* at 148 n.347, 150-54. Meanwhile, Deutsche Bank issued false and misleading analyst reports praising Enron for that inflated income, and underwrote securities offerings predicated on Enron's false financial statements.

**2. Project Tomas**

"Project Tomas was structured to increase the tax basis of a portfolio of leased assets that Enron liquidated." ¶797.25; JCT Report at 189. This liquidation was not to occur for at least two years. Even though Project Tomas "closed" in September 1998, Deutsche Bank continued to act in furtherance of the fraudulent scheme throughout the Class Period. Like in each of the other fraudulent transactions, Deutsche Bank's continuing participation was necessary to make Project Tomas work. As stated by the JCT Report: "'To dispose of the leased assets with a stepped-up basis without incurring tax, ***Enron formed a partnership with Bankers Trust***, which in essence served as an accommodation party in the transaction. Without a willing though unrelated third party to hold the leased assets through a partnership ***for at least two years before selling them off***, the tax savings and financial statement benefits claimed through the use of this structure would not have been possible.'" ¶797.27 (quoting JCT Report at 206).

Indeed, "central" to Project Tomas was the sale of assets by Deutsche Bank and Enron in December 2000. JCT Report at 200-21. The Enron/Deutsche Bank partnership, named Seneca, existed until nearly the end of 2000, when it sold the Project Thomas assets. *Id.* at 196. And another part of Project Tomas involved the maintenance of approximately $250 million notes receivable by Deutsche Bank, which was repaid December 2001. *Id.* at 200. The JCT Report estimates Project Tomas caused Enron's financial statements to be artificially inflated by $55.99 million in 1998, $9.85 million in 1999 and $51.29 million in 2000. ¶797.27; JCT Report at 190 n.487. In addition to this income recognized from Project Tomas, the transaction also provided Enron with $95 million in tax savings in 1998-2001. *Id.* Thus, during the Class Period, Deutsche Bank was a partner in the entity at the heart of Project Tomas that resulted in Enron's earnings being materially and artificially inflated. ¶797.18. Meanwhile, Deutsche Bank issued false and misleading analyst reports praising

Enron for those inflated earnings, and underwrote securities offerings predicated on Enron's false financial statements.

### 3. Project Steele

Project Steele, like Project Cochise, allowed Enron and Deutsche Bank "'each to claim a deduction for the same pool of money-closing mortgage-backed securities owed by the investment bank.'" ¶797.13 (quoting *Business Week*). As in Project Cochise, Deutsche Bank was paid for creating Project Steele and also for its ***continuing participation*** in the fraudulent transaction. ¶797.14. In October 1997, Deutsche Bank bought into ECT Partners (the Enron SPE at the heart of Project Steele), and in return Deutsche Bank received "approximately a five percent preferred ownership interest in ECT Partners." JCT Report at 139.[7] Deutsche Bank intended to, and did in fact, remain a partner of ECT Partners throughout the Class Period in order to achieve the financial statement manipulations for which Enron paid Deutsche Bank. *Id.* at 139 n.324. Even though Project Steele "closed" in 1997, Steele (through ECT Partners) contributed $65 million in net earnings to Enron's bottom line from 1997 through 2001. ¶797.14. Thus, Deutsche Bank was engaged in falsifying Enron's financial statements throughout the Class Period.

Deutsche Bank agreed to further Project Steele long after the transaction closed (again, acting during the Class Period) to falsely inflate Enron's financial statements through 2001. As noted in the JCT Report:

> In order to provide substance to the [Project Steele] transaction, Bankers Trust [*i.e.*, Deutsche] anticipated ***holding the stock received until at least 2002***. In order to compensate Bankers Trust for delaying the realization of its tax loss for a number of years, Bankers Trust requested Enron pay Bankers Trust the present value cost of delaying such losses. This was described in correspondence between Bankers Trust and Enron that qualified the present value cost to Bankers Trust of entering into Project Steele.

JCT Report at 135-36. Thus, even though Project Steele "closed" in 1997, Deutsche Bank continued to act as Enron's partner in the fraudulent transaction through the end of the Class Period and was paid for its continuing role. Meanwhile, Deutsche Bank issued false and misleading analyst reports

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[7] *See also* ¶797.13 ("'BT transferred these securities, known as REMICs, to a new partnership known as ECT Investing Partners that it jointly owned with Enron.'").

praising Enron for the inflated income Project Steele caused, and underwrote securities offerings predicated on Enron's false financial statements.

**4. Project Teresa**

Project Teresa purportedly enabled Enron to take greater write-offs of its office building in future years, which Enron accounted for as present income, by artificially inflating the building's value $1 billion. ¶797.16. Project Teresa, like Project Steele, worked because Enron was able to create two phony SPEs with Deutsche Bank. These phony SPEs artificially inflated Enron's reported financial results throughout the Class Period, and Deutsche Bank was an "investor" in and maintained its conduct in Project Teresa throughout the Class Period, regardless of the date that Project Teresa "closed."

According to Congressional investigators:

> The initial step in the implementation of Project Teresa was the organization and financing of the various participating entities. On March 21, 1997, Enron Corp., togther with ... EN-BT Delaware, Inc. ("EN-BT Delaware") (a subsidiary of Bankers Trust [*i.e.*, Deutsche]) contributed property to Organizational Partner, Inc. ("Organizational Partner" or "OPI") in exchange for OPI common stock and OPI preferred stock.... EN-BT Delaware [along with another investor] collectively contributed $22.4 million in cash in exchange for 20,000 shares of OPI preferred stock that represented two percent of the equity and 25 percent of the voting rights in Organizational Partner.

JCT Report at 168. Deutsche Bank, through EN-BT Delaware also "contributed $10.433 million in cash in exchange for a one percent limited partner interest" in Enron Leasing Partners, LP. *Id.*; *see also* ¶797.17.

Project Teresa worked because Deutsche Bank's entities "implemented a plan of quarterly pro-rata redemptions" to "generate income for financial accounting purposes." JCT Report at 169. To accomplish this, Deutsche Bank continued its conduct and remained a partner in OPI and Enron Leasing Partners, LP throughout the Class Period. *Id.* at 170.[8] Accordingly, Project Teresa artificially inflated Enron's earnings by $226 million from 1997-2001. ¶797.18. Meanwhile, Deutsche Bank issued false and misleading analyst reports praising Enron for those inflated earnings, and underwrote securities offerings predicated on Enron's false financial statements.

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[8] *See also* ¶797.17 ("'Bankers Trust (the promoter of the transaction) contributed cash to the partnership.'").

### 2. Lead Plaintiff Sufficiently Alleges Deutsche Bank Made False and Misleading Statements in Violation of Rule 10b-5

#### a. Deutsche Bank's False and Misleading Statements Issued During the Class Period

##### (1) Analyst Reports

Throughout the Class Period, Deutsche Bank issued analyst reports containing Enron's false and misleading financial results, concealing material adverse information about Enron, and rating Enron's stock inconsistent with its internal information. While stating unmitigated praise for Enron and its business prospects, each of Deutsche Bank's analyst reports concealed that Enron's purported financial results were created by bogus tax schemes and not business operations.

For example, on July 13, 1999, Deutsche Bank issued a report on Enron that rated Enron a "***Buy***," forecasted a 17% three-year EPS growth rate for Enron, and reported Enron's EPS of $[0.27]. ¶159. On October 13, 1999, Deutsche Bank issued a report on Enron rating it a "***Buy***"and noting: "'***We fully anticipate that the company will be capable of producing EPS growth in excess of 15%*** ....'" ¶184. On January 28, 2000, Deutsche Bank issued a report on Enron rating it a "***Buy***," ***raising*** the stock's target price to $90 and forecasting 2000 EPS of $1.35 and a 15% three-year EPS growth rate for Enron. Deutsche Bank also stated:

> "***All we can say is WOW!... Enron stole the show last week at its annual analyst conference in Houston.... Enron management unleashed a strategy that projects monumental earnings potential over the next 5 years....***
>
> ***As such, we are raising our target price on ENE shares .... We reiterate our BUY recommendation on ENE shares.***
>
> ***We believe Enron's 1999 earnings results demonstrate its best-in-class natural gas and power marketing and energy services skills....*** We fully anticipate that the company will be capable of producing EPS growth in excess of 15% ...."

¶210. Deutsche Bank, however, did not disclose that Enron's 1999 earnings results had been artificially inflated by Projects Steele, Teresa, Cochise, Tomas and Renegade. ¶¶797.1, 797.10.

Similarly, on April 14, 2000, Deutsche Bank issued a report on Enron rating the stock a "***Buy***," raising its price target to $96 and increasing Enron's forecasted 2000 and 2001 EPS to $1.37 and $1.60 and its three-year EPS growth rate to 16%. The report also stated, among other things:

- "Management reviewed the strong Q1 operating EPS of $0.40/share that produced a 17.7% increase over 1Q99 EPS of $0.34/share.

- ***[S]trong Q1 earnings results and substantial business development in the wholesale, retail, and broadband segments bode well for continued earnings growth.***"

¶232. Again, Deutsche Bank did not disclose that Enron's earnings results had been artificially inflated by Projects Steele, Teresa, Cochise, Tomas and Renegade. ¶¶797.1, 797.10. Deutsche Bank made similar statements in its analyst reports throughout the Class Period. *See* ¶¶127, 131, 146, 152, 159, 184, 210, 232, 237, 243, 253, and 257.

Deutsche Bank's analyst reports on Enron issued after the end of 1999 were false and misleading for another reason. After LJM2 was formed and Deutsche Bank and/or its top executives had secretly been permitted to invest in LJM2 (ultimately to the tune of over $10 million), Deutsche Bank continued to issue very positive analyst reports on Enron. These reports contained the following "boilerplate" disclosure:

> Deutsche Bank Securities Inc., DB Alex. Brown LLC., and their affiliates worldwide, may hold a position or act as market maker in the financial instruments of any issuer discussed herein or act as advisor or lender to such issuer.

Ex. C at 3-4. These boilerplate disclosures were substantially the same as they were before December 1999 – *i.e.*, they did not change after Deutsche Bank and/or its top executives became huge investors in LJM2. In addition to the other material facts not disclosed, Deutsche Bank's failure to disclose its LJM2 investments made its "boilerplate" disclosure false and misleading and concealed from the market the very significant and serious conflict of interests which Enron and Deutsche Bank knew would have cast serious doubts on the objectivity and honesty of Deutsche Bank's analyst reports.

The Court has already recognized the materiality of such omissions. *See Enron*, 235 F. Supp. 2d at 700-01 ("Lead Plaintiff has pointed out that the bank's boilerplate disclosures remained the same as they were before the funding of LJM2 in December 1999, never mentioning specifically the investments of its top executives in the entity, its funding of the partnership during 2001 ... or any of the significant conflicts of interest that would cast doubt on its analysts' objectivity and honesty in evaluating Enron stock.").

### (2) Offering Documents

In addition to making false and misleading statements in its analyst reports, Deutsche Bank made false and misleading statements in offering documents in its role as an underwriter of Enron securities. Critically, Deutsche Bank participated in underwriting billions of dollars of off-balance sheet debt between 1999-2001 to finance the Enron Ponzi scheme and falsify Enron's reported cash flows.[16] Each offering was made pursuant to a false and misleading prospectus that incorporated Enron's admittedly false financial statements, which have now been restated. Deutsche Bank sold Enron's securities pursuant to those offering documents even though it had falsified Enron's financial statements via the STDs, and obviously knew Enron's reported financial results were materially false and misleading.

Additionally, Deutsche Bank underwrote certain Enron equity offerings, including Enron's February 1999 offering of 27.6 million shares of common stock at $31.34 – raising $861 million for Enron. ¶790.[17] The prospectus for that offering incorporated Enron's financial results that had been falsified by Deutsche Bank's Projects Steele and Teresa. *See, e.g.*, ¶797.10. These statements, like Deutsche Bank's analyst reports, are actionable under Rule 10b-5.[18]

#### b. Deutsche Bank Knew or Recklessly Disregarded that its Statements Misled Investors

The Court "must consider any evidence of scienter pleaded by the plaintiffs ***cumulatively***." *Goldstein*, 2003 U.S. App. LEXIS 15001, at *18. In addition to the fact that Deutsche Bank knew Enron's financial statements to be false because of its work on the STDs, Deutsche Bank was privy

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[16] In September 1999, Deutsche Bank underwrote the Osprey offering of $1,400,000,000 8.31% Senior Secured Notes due 2003. In August 2000, Deutsche Bank underwrote the Enron Credit Linked Notes Trust offering of $500,000,000 8% Enron Credit Linked Notes due 2005. In September 2000, Deutsche Bank underwrote the Osprey Trust offering of $750,000,000 7.797% Senior Secured Notes due 2003, and €315,000,000 6.375% Senior Secured Notes due 2003. In July 2001, Deutsche Bank underwrote the Marlin Water Trust offering of $475,000,000 6.31% Senior Secured Notes due 2003, and €515,000,000 6.19% Senior Secured Notes due 2003. *See* ¶1016.4.

[17] The Deutsche Bank entity that underwrote the offering, BT Alex. Brown Inc., was acquired by Deutsche Bank on June 4, 1999 and is an affiliate of Bankers Trust Company. ¶107(d).

[18] Deutsche Bank is liable for its role in these offerings, which were made in furtherance of the fraudulent scheme to falsify Enron's cashflow and/or maintain the Ponzi scheme, under Rule 10b-5(a) and (c) as well as Rule 10b-5(b).

to a great deal more alerting it to the true condition of Enron. For instance, Deutsche Bank was one of Enron's Tier 1 banks and was in constant contact with Enron and its senior officers concerning Enron's financial condition. 3rd Report, App. G at 10. By 2000, Deutsche Bank learned Enron's undisclosed off-balance sheet debt was significantly higher than anyone knew:

> In early 2000, BT/Deutsche became cognizant of a change in Enron's balance sheet and income statement.... ***Recognizing that the extent of Enron's off-balance sheet obligations could not be discerned from its financial statements***, BT/Deutsche held several meetings with Enron to probe the increasing dependency of Enron on its trading activities and asset sales. During those meetings, BT/Deutsche requested and received information about [among other things] the level of [Enron's] off-balance sheet obligations.... ***Enron consistently informed BT/Deutsche that its off-balance sheet obligations were in the range of $9-$10 billion***.

*Id.* at 22-23. Accordingly, there is little doubt that Deutsche Bank knew of a great deal more off-balance sheet debt than Enron publicly disclosed.

Moreover, Deutsche Bank and its executives were invited (and committed) to invest at least $10 million in the lucrative LJM2 partnership. *See* ¶797. As an investor in LJM2, Deutsche Bank learned even more about Enron's questionable transactions. *Enron,* 235 F. Supp. 2d at 617. Deutsche Bank prefunded LJM2 with $1.5 million in late December 1999, so that LJM2 could complete certain transactions with Enron days before year-end 1999 and Enron could artificially boost its 1999 results from operations. *See* ¶797. As the Court previously held, knowledge of LJM2 and the obvious opportunity for self dealing, and LJM2's "promise of extraordinary returns" followed by "actual, exorbitant returns, would raise flags to any objective party investing in it and doing continuing business with Enron." 235 F. Supp. 2d at 697. But Deutsche Bank gained even further knowledge of facts raising flags as to the improper nature of LJM2's transactions, for ***Deutsche Bank had its own designee appointed to LJM2's advisory committee***. 3rd Report, App. G at 13.

### C. Lead Plaintiff Properly Alleges Reliance Under Rule 10b-5(a) and (c) Pursuant to the Fraud-on-the-Market Theory

Ignoring the facts and the law, Deutsche Bank claims that the plaintiffs fail to plead "reliance" as to it with respect to the STDs. Motion at 23. As this Court determined: "Reliance under prongs (a) and (c) can also be established by the fraud-on-the-market doctrine ...." *Enron*, 235 F. Supp. 2d at 693. Lead Plaintiff alleges that the STDs "operated to present a falsely positive

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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| **In re:** | **Chapter 11** |
| **ENRON CORP., *et al.*,** | **Case No. 01-16034 (AJG)** |
| **Debtors.** | **Jointly Administered** |

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**APPENDIX G**

**(Role of BT/Deutsche and its Affiliates)**

**to**

**THIRD INTERIM REPORT OF NEAL BATSON, COURT-APPOINTED EXAMINER**

Reference is made to the preceding Third Interim Report of Neal Batson, Court-Appointed Examiner (the "Report"). This Appendix constitutes an integral part of the Report. All capitalized terms not otherwise defined herein shall have the meanings set forth in the Report.

- designed, promoted and participated in the Cochise Transaction while knowing that the transaction served no substantial business purpose for Enron other than enabling Enron to report the potential benefit of speculative future tax deductions in an erroneous and misleading manner as gain on the sale of the Cochise Planes and other pre-tax income.[12]

As a result, BT/Deutsche's claims in the Bankruptcy Case, totaling more than $227 million, are susceptible of being equitably subordinated to the claims of other creditors. This would be in addition to any affirmative recovery that may be available to the Debtors against BT/Deutsche for aiding and abetting the officers' breaches of fiduciary duty, assuming that the Debtors have standing to pursue such a claim.

Another area of BT/Deutsche's involvement in Enron's SPE transactions was the Marlin and Whitewing Share Trust Transactions. In the Second Interim Report, the Examiner concluded that Enron should have consolidated Whitewing Associates L.P. ("Whitewing Associates") and its subsidiaries in Enron's financial statements, and that Enron's financial statements did not fully describe the amount or nature of Enron's contingent liabilities in the Whitewing structure.[13] In this Appendix, the Examiner concludes that there is insufficient evidence available to date that BT/Deutsche's activities in connection with the Share Trust Transactions, standing alone, comprise actionable aiding and abetting of Enron's officers in breaching their fiduciary duties or that BT/Deutsche's claims should be equitably subordinated to the claims of other creditors. The Examiner concludes that there is insufficient evidence available to date that BT/Deutsche had actual knowledge of the extent to which entities in the Share Trust

[12] *See* Discussion Material for Project Cochise, June 15, 1998 (PowerPoint presentation materials) [AB000490808-AB000490818]; Discussion Material for Project Cochise, July 27, 1998 (PowerPoint presentation materials) [K&S027706-K&S027717]; see *also* Second Interim Report, Annex 2 to Appendix J (Tax Transactions).

[13] Second Interim Report, Appendix G (Whitewing Transaction).

$1,027,000,000 Senior Secured Notes in October 2000 (the "Osprey II Notes"),[46] and $915,000,000 Senior Secured Notes in July 2001 (the "Marlin II Notes").[47]

BT/Deutsche was active in trading these notes on the secondary market.[48] BT/Deutsche used its own capital to facilitate the trading on the secondary market, and considered its ability to facilitate the secondary trading of securities it had initially issued as one of its competitive strengths.[49]

In December 1999, at the invitation of Fastow, a BT/Deutsche affiliate committed to invest $10 million in LJM2.[50] The BT/Deutsche affiliate also placed a designee on the LJM2 Advisory Committee.[51]

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[46] Deutsche Bank Response, paragraph (m). The Osprey II Notes included $750,000,000 Notes and €315,000,000 Notes, and BT/Deutsche was the initial purchaser of Osprey II Notes in the amounts of $300,000,000 and €126,000,000. Section 2(a) and Schedule A, Note Purchase Agreement for U.S. $750,000,000 7.797% Senior Secured Notes due 2003, and €315,000,000 6.375% Senior Secured Notes due 2003, Sept. 28,2000 [SS000025440-SS000025481].

[47] Deutsche Bank Response, paragraph (i). The Marlin II Notes included $475,000,000 Notes and €515,000,000 Notes, and BT/Deutsche was the initial purchaser of Marlin II Notes in the amounts of $166,250,000 and €180,250,000. Section 2(a) and Schedule A, Note Purchase Agreement for U.S. $475,000,000 6.31% Senior Secured Notes due 2003 and €515,000,000 6.19% Senior Secured Notes due 2003, July 12,2001 [AB000045466-AB000045513].

[48] Orchant Sworn Statement, at 97, 313, 378 and 449; Deutsche Bank Presentation to Enron, Osprey Trust Structure, Marketing New Senior Notes, June 30,2000, at 3-4 (PowerPoint presentation materials) [DBG-005711-DBG-005758].

[49] Orchant Sworn Statement, at 311-13.

[50] Cambridge Sworn Statement, at 220 and 230; Letter from Andrew S. Fastow, Enron, to Paul F. Cambridge, Deutsche Bank, Sept. 27, 1999 [AB 000550122]; Letter from Michael J. Kopper, Managing Director, Enron, to Paul Cambridge, Deutsche Bank, Oct. 5, 1999 [DBG 021675]. The BT/Deutsche affiliate has satisfied capital calls for approximately $7.3 million and has received distributions of approximately $6.5 million from LJM2. Response to Request No. 11, Deutsche Bank AG's Objections and Responses to the Feb 3, 2003, Rule 30(b)(6) Letter Requests.

[51] Facsimile from Emmet, Marvin & Martin, LLP, Counselors-at-Law, to William Walsh, *et al.*, Dec. 9, 1999 [AB0971 02164-AB0971 021671; Letter from LJM Capital Management, L.P. to BT Investment Partners, Inc. and Deutsche Securities, Inc., July 6, 2000 [LJM056511-LJM056516]; Cambridge Sworn Statement, at 246 and 248.